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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 786

SYDNEY A. TABER,

Appellant,

vs.

STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY OF NEW JERSEY,

Appellee

STATEMENT AS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT IN QUESTION.

The appellant, having presented his petition for the allowance of an appeal in this cause to the Supreme Court of the United States, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on appeal to review the judgment in question.

(a) Statutory Provision Believed to Sustain Jurisdiction

This appeal is prosecuted from a final judgment of the Supreme Court of New Jersey (formerly the New Jersey

Court of Errors and Appeals [1]), the highest court of the State of New Jersey, which denied appellant's appeal from a judgment of the (former) New Jersey Supreme Court sustaining the order of the appellee Board, which had suspended the license of appellant to practice dentistry.

The jurisdiction of this court rests upon the provisions of 28 U. S. C. 1257(2) on the ground that in this cause the validity of a State statute was drawn into question as repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States, and the decision was in favor of the validity of the State statute.

(b) Statute Involved

The statute involved in this cause is section 45:6-7(h) and section 45:6-19 of Title 45 of the Revised Statutes of New Jersey (N. J. S. A. 45:6-7(h) and 45:6-19). Section 45:6-7 (h) reads as follows:

> "Any license to practice dentistry may be revoked or suspended by the board upon proof to its satisfaction that the licensee:
>
> • • • • • • •
>
> h. Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in section 45:6-19 of this title or has entered into possession of such dental material or equipment as may be necessary for the management of a dental office which is owned by any such unlicensed manager, proprietor, operator or conductor on the basis of a lease or other agreement

[1] The court system of New Jersey was changed, both in functions and in nomenclature, while this case was pending on the second appeal in that state. The name of the New Jersey Court of Errors and Appeals was changed to the Supreme Court of New Jersey. The name of the New Jersey Supreme Court was changed to the Superior Court. Distinction will be made throughout this Statement between the former Supreme Court (a court of first instance) and the present Supreme Court (the highest court of the state).

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for compensation for the use of such material, equipment or office or has entered into any arrangement by which there is made available to him, for his use, dental material, equipment, or office, the ownership or control of which is retained by any such unlicensed manager, proprietor, operator or conductor, except where the transaction is a bona fide sale of dental material or equipment secured by chattel mortgage or conditional sale agreement."

Section 45:6-19 reads as follows:

"The terms manager, proprietor, operator or conductor as used in this chapter shall be deemed to include any person who

(1) Employs operators or assistants; or

(2) Places in the possession of any operator, assistant, or other agent such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease or any other agreement for compensation for the use of such material, equipment or office; or;

(3) Retains the ownership or control of dental material, equipment or office and makes the same available in any manner for the use by operators, assistants or other agents; provided, however, that the above shall not apply to bona fide sales of dental material or equipment secured by chattel mortgage."

(c) Dates Involved

The final judgment of the Supreme Court of New Jersey was handed down on January 24, 1949. A petition for rehearing was denied on February 14, 1949. The petition for appeal to this Court was presented on March 31, 1949.

(d) History of the Case

This case arose when the State Board of Registration and Examination in Dentistry of New Jersey served on the appellant, on May 15, 1946, a Notice for Revocation or Sus-

pension of License (Record, pp. 5-7). That Notice of Hearing stated the grounds to be that appellant had "been employed by an unlicensed manager, proprietor, operator and conductor", as defined in section 45:6-19, "in that" appellant had entered into possession of dental material and equipment, etc., and "in that" appellant had entered into an arrangement whereby dental material, equipment, and office were made available to appellant, etc. (By "etc.", above, is meant that the Board quoted the exact words of the statute as set out supra.)

A hearing was held, at which evidence was introduced concerning appellant's office arrangements, his equipment and materials, and his alleged employment by one David Locks, who was not a licensed dentist. On July 27, 1946 the Board adopted a Resolution—worded in the exact words of the statute—in which the Board found appellant guilty of violation of sections 45:6-7(h) and 45:6-19, and ordered his dental license suspended for a period of six months. That Resolution, which does not set forth a single specific fact, or mention any particulars, or name any names, but merely recites the statute, is set forth in the Record at pp. 317-319. On February 18, 1947, the (former) New Jersey Supreme Court set aside the suspension order of the Board on the ground that subdivision (h) of section 45:6-7 was unconstitutional (R. 321-322). The New Jersey Court of Errors and Appeals on May 13, 1948, reversed the New Jersey Supreme Court and held constitutional the following portion of sub-division (h):—"(h). Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in section 45:6-19 of this Title . . .".

The Court of Errors and Appeals remanded the case to the (former) Supreme Court with instructions to determine questions of fact. The Supreme Court, on July 15, 1948, held that the record supported findings of fact bringing appellant within the decision of the Court of Errors and

Appeals. An appeal was taken from this decision to the Court of Errors and Appeals. While the appeal was pending, the court system of New Jersey was reorganized and the new Supreme Court of New Jersey took over all cases pending before the old Court of Errors and Appeals. On January 24, 1949, the Supreme Court of New Jersey handed down its decision and judgment modifying and affirming the decision of the (former) Supreme Court. A petition for rehearing was timely filed and was denied by the (new) Supreme Court on February 14, 1949, without opinion.

The first decision of the New Jersey (former) Supreme Court is reported in 135 N.J.L. 255, 51 Atl. (2) 250. The decision of the Court of Errors and Appeals is reported in 137 N.J.L. 161, 59 Atl. (2) 231. The second decision of the (former) Supreme Court is reported in — N.J.L. —, — Atl. (2) —. The decision of the present Supreme Court of New Jersey is not yet reported. Copies of all the opinions are appended hereto.

(e) Raising the Federal Question

The unconstitutionality of the statute was raised when this case first came before the State Courts for review of the Board's order of suspension, in the Reasons for Reversal stated in the application for certiorari in the New Jersey Supreme Court (R. 3-4). It was argued in the brief in that Court (Prosecutor's brief, pp. 37-40), which specified the Fourteenth Amendment (p. 39), and was sustained by the Supreme Court in its first decision (R. 321-322) which stated (R. 322): "The statute so far as subdivision (h) is concerned is unconstitutional. . . . The conviction might be set aside on other grounds argued, but we have chosen to rest our decision on the single ground that the provision of the statute under which the suspension was had is a violation of the constitutional right to be free of arbitrary interference with a lawful calling. *Levin* v.

State Board, 121 N.J.L. 193; *Liggett* v. *Baldridge*, 278 U. S. 105, 113".

The first appeal, to the then Court of Errors and Appeals, was taken by the Board, and so there was of course no opportunity for this appellant to raise the question of constitutionality in the appeal papers. The Board's "Notice of Appeal and Grounds" (R. 324) set forth no specific ground. However, the question of the repugnance of the statute to the Fourteenth Amendment was again argued on this appeal (Defendant-Appellant's Brief, pp. 4-9; Prosecutor-Appellee's Brief, pp. 40-48). The Court of Errors and Appeals reversed the Supreme Court and sustained the validity of specified portions of the statute, stating: "We conclude that so much of R.S. 45:6-7(h) as we have quoted above is constitutional". Since the cases relied upon by the Court of Errors and Appeals by way of analogy, were decisions of the Supreme Court of the United States (*Dent* v. *West Virginia*, 129 U. S. 114; *Hawker* v. *N. Y.*, 170 U. S. 189; *Reetz* v. *Michigan*, 188 U. S. 505; *Watson* v. *Maryland*, 218 U. S. 173; *Collins* v. *Texas*, 223 U. S. 173; *McNaughton* v. *Johnson*, 242 U. S. 344), it is clear that the Court of Errors and Appeals sustained the validity of the statute under the federal Constitution.

There was no opportunity to continue to assert unconstitutionality when the case was remanded to the (old) Supreme Court for findings of fact, since there were no further proceedings before that court; it merely made determinations of fact from the record as made before the Board.

On the second appeal, this time taken by the present appellant, the repugnance of the statute to the federal Constitution was again raised in the Grounds of Appeal (point 2) in the following manner: "Sections 45:6-7(h) and 45:6-19 of the Revised Statutes of New Jersey, to the extent involved in this proceeding, are repugnant to the due process

clause of the Fourteenth Amendment to the Constitution of the United States". The present Supreme Court of New Jersey, in its decision rendered January 24, 1949, did not specifically rule on the question of constitutionality. It stated: "We have no occasion to review the determination of the Court of Errors and Appeals, *supra*, that the involved portion of the statute is both severable and constitutional".

A petition for rehearing, filed on February 3, 1949, was directed solely to the contention of repugnance of the statute to the Fourteenth Amendment. It was denied without opinion on February 14, 1949.

(f) Nature of the Case and Substantiality of the Questions Involved

This case, in its ramifications, far transcends the profession of dentistry as such. It raises the perennial question of the extent to which the states may regulate the many professions, such as dentistry, medicine, pharmacy, psychiatry, and others. The authority of a state, under its police power, to impose conditions and restrictions on a profession such as dentistry cannot be doubted; but the question in every case is whether the legislation is "reasonable", in the light of the nature of the profession and the facts of the case, *Mugler* v. *Kansas*, 123 U. S. 623; *Lawton* v. *Steele*, 152 U. S. 133; *Liggett* v. *Baldridge*, 278 U. S. 105. It is axiomatic that in a case of this sort, prior decisions are of little value in aiding a court to determine what is a "reasonable" regulation of a profession. To a large extent each case rests on the social and economic conditions involved, and perhaps the most that this Court can do is to establish landmarks along the way, as states continue to enact legislation. In the field of "due process" law with regard to professions, a new landmark is sorely needed at this time, for (aside from *Daniel* v. *Family*

Security Life Insurance Co., No. 297, Oct. Term, 1948, decided by this Court on February 28, 1949, to be discussed *infra*) this Court has not issued a ruling since *Liggett* v. *Baldridge*, 278 U. S. 105 (1928), decided more than twenty years ago. Thus the Court's last important decision in the fields closely allied to dentistry is directly opposed to extending the police power of the states over medical and allied professions. In the last twenty years almost every other aspect of "due process" law has been reconsidered and either reaffirmed or remolded; and for the guidance of the professions, the bar, and the courts, this Court should now enunciate the extent of the power of the states over professions.

We turn to consideration of the statute involved in this case.

No person should quarrel with a state statute regulating dentists in terms of competence and qualifications. The statutory provisions involved here, however, do not even pretend to be concerned with the competence of dentists, their qualifications to practice, their dealing with the public, their treatment of patients, their false or exaggerated claims, *or any operation connected with the actual practice of dentistry.* This statute does not address itself to the quality or nature of materials and equipment used by a dentist. This statute is not even concerned with the ethics or morals of dentists, their advertising, or their personal conduct. This statute is based on a wholly different thesis.

An examination of the New Jersey laws regulating the practice of dentistry reveals that the existing statutory provisions, aside from those involved in this case, adequately cover the contact of dentists with the public, and the actual operation in dental offices. Thus, R.S. 45:6-7 provides that the license of a dentist may be revoked or suspended on the ground of malpractice (subdivision (d)); or neglect (d); or employing unlicensed persons to do

work which must be done by licensed persons (e); or the habitual use of drugs or intoxicants to an extent rendering him unfit for the practice of dentistry (c). Practice under a corporate or trade or firm name is forbidden (f). Advertising and soliciting are regulated in considerable detail (g). Finally, in section 45:6-19, under the definition of "practicing dentistry", there are elaborate and detailed provisions, in specific terms and in dental terminology, governing the kind of actual work that is covered by the dental code.

It cannot be alleged, therefore, that the New Jersey law, aside from the provisions involved here, is inadequate to protect the public. It cannot be alleged that these provisions, first enacted in 1941, were passed to cover some deficiency in the earlier law. These provisions were enacted for another purpose—to extend the control of the state over the business affairs of dentists, and to attempt to dictate how a dentist should run his office *aside from his dental operations*. This is a wholly unreasonable attempt by the State of New Jersey; it is not justified by facts, or economic or social conditions; it exceeds the police power of the State and is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The citation of cases, as was said earlier, contributes little to the discussion. Both the United States Code Annotated and the Federal Code Annotated, in the section under the due process clause devoted to state regulation of business or professions, collect a large number of cases running from "Accountants" to "Veterinarians". Perusal of those cases does not materially add to one's knowledge of what, in any given situation, is a reasonable exercise of the police power over professions. A few decisions, however, are helpful.

The right to engage in a business or profession is of

course a property right protected by the due process clause. *Liggett* v. *Baldridge, supra; New State Ice Co.* v. *Lieberman,* 285 U. S. 262. Long ago this Court declared that a state may not, under the guise of protecting public health, unreasonably interfere with an occupation. *Mugler* v. *Kansas,* 123 U. S. 623; *Lawton* v. *Steele,* 152 U. S. 133. In *Liggett* v. *Baldridge,* the Court had occasion to apply this principle in a case quite similar to the case at bar, in the sense that both involve the alleged control by non-licensed persons over a professional man licensed by state law. The *Liggett* case involved a Pennsylvania statute making it a crime for any person not a licensed pharmacist to (a) own a pharmacy, (b) be a partner in a firm owning a pharmacy, or (c) own stock in a corporation owning a pharmacy. This Court, pointing out that the existing state laws adequately covered the relations of pharmacists with the public, the manufacture and sale of drugs, the qualifications of pharmacists, the competence of employees, and other phases of pharmacy, struck down the statute as bearing no reasonable relation to the profession of pharmacy.

This very point had arisen squarely in the case of dentistry in *State* v. *Brown,* 37 Wash. 97, where the court struck down a state statute forbidding unlicensed persons to "own, run, operate or cause to be operated, or manage a dental office", on the ground that the statute had nothing to do with the competence or qualifications of persons doing the actual work, and had no reasonable relation to the health or physical welfare of the public. In other states and with regard to other professions, analogous judicial holdings may be found. See, *e.g., People* v. *Ringe,* 197 N. Y. 143; *Schnaier* v. *Navarre Hotel,* 182 N. Y. 83; cf. *State* v. *Armstrong,* 38 Idaho 493, 225 Pac. 491; *Noel* v. *People,* 187 Ill. 587, 58 N. E. 616.

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These cases are all opposed to the thesis of the statutory provisions involved here. That thesis is that because a state may regulate the profession of dentistry, it may regulate every aspect of a dentist's business and of a dentist's office. In our opinion this statute reaches beyond the legitimate police power of the state; in view of the comprehensive provisions of the dentistry statute set out earlier, these provisions cannot be shown to have a reasonable basis in the protection of the public; and they should be stricken down as in violation of the due process clause.

Nothing necessarily divergent from these cases, or from *Liggett* v. *Baldridge, supra,* is contained in the recent decision of this Court in *Daniel* v. *Family Security Life Insurance Co.,* decided February 28, 1949, nor does the *Daniel* decision involve a statute at all similar to the one at bar. The state statute in that case prohibited life insurance companies and their agents from operating an undertaking business, and barred undertakers from serving as agents for life insurance companies. In sustaining the statute, this Court expressly distinguished the *Liggett* case by stating that the "far different" statute in the *Liggett* case was "clearly less adapted to the recognized evil than the provision now before us." The Court did, in dictum, state that "a pronounced shift of emphasis since the *Liggett* case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend", but analysis demonstrates that this dictum has no direct relevance to the case at bar. The Court, in the very next sentence in the *Daniel* case, said: "See *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.,* 335 U. S. 525, where the cases are reviewed". But the *Lincoln* case deals with labor unions, not professions; the two cases chiefly relied upon there are *Osborn* v. *Ozlin,* 310 U. S. 53, an insurance case, and *Olsen* v. *Nebraska,* 313 U. S. 236, involving private em-

ployment agencies; and *without exception,* every case collected in the *Lincoln* decision, the *Osborn* decision, and the *Olsen* decision deals with business and commerce, not with a profession. The cases collected involve milk prices, insurance rates, wages and hours, ticket agencies, tobacco handling charges, coal prices, banking, and commissions of insurance agencies; not one involves a profession, in which traditionally there has been greater freedom from regulation than in business. This Court itself in the *Daniel* case, robs that decision of relevance to a case involving a profession by stating (in footnote 4) after it has sustained the reasonableness of the statute there involved: "Our deference to the legislative judgment is particularly pronounced in a field as traditionally well regulated as insurance". Thus, for the purposes of the case at bar, the *Liggett* decision remains the last authoritative word of this Court.

(g) Conclusion

The decision below involves the substantial question of the extent of the power of a state to regulate a profession without regard to the competence or qualifications of the professional man. As such, it involves the barrier between reasonable control and total control of persons engaging in the professions. The question arises in many states, not only New Jersey, and in many professions, not merely dentistry.

The statute here is an unwarranted attempt to exercise the police power of the state and is repugnant to the due process clause of the Fourteenth Amendment. This Court should determine the case on the merits and, in striking down these provisions, should lay down a guide for state regulation of

professions in other than the actual practice of the profession.

Respectfully submitted,

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APPENDIX "A"

NEW JERSEY SUPREME COURT, JANUARY TERM, 1947

No. 237

SYDNEY TABER, *Prosecutor,*

vs.

STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY OF NEW JERSEY, *Defendant*

Argued January 22, 1947. Decided ——, 1947

On Certiorari

A legislative enactment which justifies the suspension of a licensed dentist, because he has leased office equipment, is an encroachment upon the liberty of the individual and unconstitutional.

For prosecutor, Brogan, Hague & Malone, Thomas J. Brogan.

For defendant, Walter D. VanRiper, Joseph A. Murphy.

Before Justices Bodine, Perskie and Wachenfeld.

BODINE, *J:*

The defendant suspended the prosecutor from the practice of his profession for a period of six months because he entered into possession of dental material and equipment necessary for the management of a dental office, which was owned by one not a licensed dentist, on the basis of a lease or other agreement for compensation for the use thereof.

The action was predicated on R. S. 45:6-7 (h).

The statute so far as subdivision (h) is concerned is unconstitutional. In the interest of the public, the practice of dentistry may be regulated. The public has no interest in the financial arrangements a dentist may make as to his

office and equipment. It is requisite that those practicing a profession have skill. A leased chair and drill are as useful in the hands of a skilled dentist as the same articles covered by a chattel mortgage which the Act permits. Many a professional man has had his start in the use of another's office and equipment.

The legislation in question is an encroachment upon the liberty of the individual which cannot be upheld on the ground of a valid exercise of the police power.

The conviction might be set aside on other grounds argued, but we have chosen to rest our decision on the single ground that the provision of the statute under which the suspension was had is a violation of the constitutional right to be free of arbitrary interference with a lawful calling. Levin *v.* State Board, 121 N. J. L. 193; Liggett *v.* Baldridge, 278 U. S. 105, 113.

The suspension is set aside.

Filed Feb. 18, 1947.

JAMES J. GAVIN,
Clerk.

APPENDIX "B"

Opinion of the Court of Errors and Appeals (Reported in 137 N.J.L. 161) (Filed May 13, 1948)

CASE, *Chief Justice:*

Sydney A. Taber, a licensed dentist of the State of New Jersey, was, after hearing by the State Board of Registration and Examination in Dentistry of this State, found guilty of violating section 45:6-7, subdivision h of Title 45 of the Revised Statutes, N. J. S. A. 45:6-7, subd. h, on the ground inter alia that he was employed by an unlicensed manager, proprietor, operator and conductor as defined in section 45:6-19, Title 45 of the Revised Statutes, N. J. S. A. 45:6-19; and his license was suspended for six months. We have particularized that specific finding as a basis for

remarks that follow. The cited statute, in subdivision h, provides in part as follows:

"Any license to practice dentistry may be revoked or suspended by the board upon proof to its satisfaction that the licensee:

• • • • • • •

"H. Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in section 45:6-19 of this Title • • •."

There are other, but severable, provisions in subdivision "h". We find it unnecessary, for the purposes of this decision, to pass upon their constitutionality. R. S. 45:6-19, N. J. S. A., referred to in the above enactment, provides:

"The terms manager, proprietor, operator or conductor as used in this chapter shall be deemed to include any person who

"(1) Employs operators or assistants; or

"(2) Places in the possession of any operator, assistant, or other agent such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease or any other agreement for compensation for the use of such material, equipment or office; or

"(3) Retains the ownership or control of dental material, equipment or office and makes the same available in any manner for the use by operators, assistants, or other agents; provided, however, that the above shall not apply to bona fide sales of dental material or equipment secured by chattel mortgage."

The Supreme Court, on writ of certiorari, found that the entire subdivision h of R. S. 45:6-7, N. J. S. A. under which the suspension was had, was unconstitutional and set the suspension aside. The question which we shall answer is whether a license to practice dentistry may constitutionally be revoked upon a justified finding that the licensee submits to employment as a practicing dentist by an unlicensed

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person within the category of R. S. 45:6-19, N. J. S. A. We shall not undertake to analyze the various circumstances which would bring an employer within the purview of that section. It will be comprehensive if we assume that the legislation makes it a ground for revocation of license if the licensee undertakes to be employed as a dentist by one who is not licensed to practice the profession of dentistry.

The statute also provides:

R. S. 45:6-13, N. J. S. A. "No person shall practice dentistry within the meaning of this chapter unless licensed so to do * * *"; and,

R. S. 45:6-19, N. J. S. A. "Any person shall be regarded as practicing dentistry within the meaning of this chapter who * * * is manager, proprietor, operator, or conductor of a place where dental operations are performed * * *."

The constitutionality of the latter statutory provisions is not disputed. It could not well be, for the restrictions so imposed upon personal liberty of actions are within the police power of the state to provide for the general welfare of its people and to that end to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. The practice of dentistry has points of close contact with that of medicine which has long been the subject of careful supervision and control. Cf. Dent *v.* West Virginia, 129 U. S. 114, 9 S. Ct. 231, 32 L. Ed. 623, Hawker *v.* New York, 170 U. S. 189, 18 S. Ct. 573, 42 L. Ed. 1002, Reetz *v.* Michigan, 188 U. S. 505, 23 S. Ct. 390, 47 L. Ed. 563, Watson *v.* Maryland, 218 U. S. 173, 30 S. Ct. 644, 54 L. Ed. 987, Collins *v.* Texas, 223 U. S. 288, 32 S. Ct. 286, 56 L. Ed. 439, McNaughton *v.* Johnson, 242 U. S. 344, 37 S. Ct. 178, 61 L. Ed. 352, Ann. Cas. 1917 B, 801. Since it is within the power of the state to provide that no unlicensed person shall be the manager, proprietor, or conductor of a dental office, it seems to us to be also within the power of the state to provide, conversely, that a licensed dentist shall not be employed in a dental office by an unlicensed manager, proprietor or conductor

(cf. McMurdo *v.* Getter, 298 Mass. 363, 10 N. E. 2d 139) and to enforce that prohibition by revoking or suspending the license of an offending licensee.

We conclude that so much of R. S. 45:6-7 (h), N. J. S. A., as we have quoted above is constitutional. Inasmuch as the remaining parts of subdivision (h) are severable, the condemnation of the entire subdivision as invalid was, regardless of the aspect of those other parts, error. Metzler *v.* Belcher, 125 N.J.L. 183, 15 A. 2d 105, and cases there cited. Whether or not the facts as disclosed in the testimony are to be resolved as coming within any part of the subsection, and, if so, which, remains undecided. The court below did not determine any of the questions of fact, although the statute R. S. 45:6-9, N. J. S. A., directs that "in case the action of the board in revoking or suspending any license shall be reviewed by writ of certiorari, the court shall determine questions of fact as well as of law * * *". The Supreme Court should, in accordance with the statute and the rules and practice of that court, determine such questions of fact as are relevant to the determination of guilt and upon such determination decide the questions of law applicable thereto.

The judgment below will be reversed and the record will be remanded to the Supreme Court for the purposes stated; costs to abide the event.

For reversal: The Chancellor, the Chief Justice, Justices Donges, Heher, Eastwood and Burling, and Judges Wells, Dill, Freund, McLean and Schettino—11.

For affirmance: None.

APPENDIX "C"

Opinion of the (Old) Supreme Court, Reported in 60 A. 2d 290 (Not Yet Officially Reported), Filed July 15, 1948

Before: Bodine, Heher and Wachenfeld, JJ.

BODINE, *Justice:*

For the sake of clarity and discussion we quote from the opinion of Mr. Chief Justice Case reported in 137 N.J.L. 161, 59 A. 2d 231, 232, as follows:

"Sydney A. Taber, a licensed dentist of the State of New Jersey, was, after hearing by the State Board of Registration and Examination in Dentistry of this State, found guilty of violating section 45:6-7, subdivision h of Title 45 of the Revised Statutes (as amended Pamph. L. 1941, ch. 316, Pamph. L. 1945, ch. 193) N. J. S. A. 45:6-7, subd. h, on the ground inter alia that he was employed by an unlicensed manager, proprietor, operator and conductor as defined in section 45:6-19, Title 45 of the Revised Statutes * * *; and his license was suspended for six months. We have particularized that specific finding as a basis for remarks that follow. The cited statute, in subdivision h, provides in part as follows:

" 'Any license to practice dentistry may be revoked or suspended by the board upon proof to its satisfaction that the licensee: * * *.

" 'h. Has been employed by an unlicensed manager, proprietor or conductor as defined in section 45:6-19 of this Title * * *.'

"There are other, but severable, provisions in subdivision 'h'. We find it unnecessary, for the purposes of this decision, to pass upon their constitutionality. R. S. 45:6-19 (as amended Pamph. L. 1941, ch. 316, Pamph. L. 1942, ch. 38), N. J. S. A. (45:6-19), referred to in the above enactment, provides:

" 'The terms manager, proprietor, operator or conductor as used in this chapter shall be deemed to include any person who

" '(1) Employs operators or assistants; or

" '(2) Places in the possession of any operator, assistant, or other person such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease or any other agreement for compensation for the use of such material, equipment or office; or

" '(3) Retains the ownership or control of dental material, equipment or office and makes the same available in any manner for the use by operators, assistants, or other agents; provided, however, that the above shall not apply to bona fide sales of dental material or equipment secured by chattel mortgages.' "

The case was remanded for us to find the facts and determine whether the action of the Board in revoking or suspending the license was proper under the statute.

We think it was implicit in our decision, 135 N.J.L. 255, 51 A. 2d, 250, that the facts justified the finding of the State Board. Nevertheless, in view of the mandate, we proceed to examine the proofs.

The first witness called was Dr. James A. Morton, who, during the year 1943, had an agreement with David Locks, of Rochester, New York. He had answered an advertisement in the New York Times for a New Jersey dentist. Pursuant to his answer, he met a Miss Howard and Mr. Locks at the Waldorf Astoria Hotel. Locks asked Morton if he would like to operate the best equipped dental office in the State of New Jersey. He brought out a blueprint showing the layout of the office at 786 Broad Street, Newark. Locks was to advance sufficient funds to set up the office in all phases such as rent, equipment, supplies and funds to carry on until the office was on a paying basis. Involved in the matter was the Dental Acceptance Company, of Rochester, and Locks.

Later, Dr. Sydney Taber took over the office and the lease. The secretary of the Fireman's Insurance Company granted the assignment of the lease from the Dental Acceptance Company or David Locks. It had credit reports and was willing to accept the Acceptance Company or Locks as tenants. Taber was a subtenant subject to guarantees from the financier.

Dr. George E. Barker worked for Dr. Morton and was there when Dr. Taber assumed full control of the office. The materials used were furnished by Locks and Barker even talked salary with him. The representative of a broadcasting company did business with Dr. Morton and Dr. Taber. When he discussed the contract with Dr. Morton, Mr. Locks spoke to him regarding the program that he liked and approved.

A reading of the whole testimony demonstrates that every detail of the business was handled and directed by Locks, or his affiliated companies. Dr. Taber was a mere employee without freedom of professional action. The evidence is, in part, circumstantial and relates to others. Wrongful conduct, in many instances, is so shown. The inferences are for the trier of the facts and support the conclusion of the Board.

We have no difficulty in finding that the prosecutor of this writ had been employed by an unlicensed manager, proprietor, operator or conductor as defined in the statute.

Judgment, in accordance with the mandate of the Court of Errors and Appeals, shall be entered.

APPENDIX "D"

Opinion of the Supreme Court of New Jersey Reported 63 A. 2d 535, Jan. 24, 1949

CASE, *Justice:*

The State Board of Registration and Examination in Dentistry, after hearing, found that Dr. Sydney A. Taber, a licensed dentist of this state, had been "employed by an unlicensed manager, proprietor, operator and conductor, as defined in Section 45:6-19 of Title 45 of the Revised Statutes (N. J. S. A.), to wit, David Locks, Dental Acceptance Co., Genessee Dental Supply Co., Arday Inc. and Arnold Park Inc.; and that said Sydney A. Taber entered into possession of such dental material and equipment as is necessary for the management of a dental office which is

owned by such unlicensed manager, proprietor, operator and conductor on the basis of a lease and other agreement for compensation for the use of such material, equipment and office; and that said Sydney A. Taber entered into an arrangement by which there was made available to him, for his use, dental material, equipment and office, the ownership and control of which is retained by such unlicensed manager, proprietor, operator and conductor, and further finds that such transaction was not a bona fide sale of dental material and equipment secured by chattel mortgage or conditional sale agreement, all of which is contrary to the provisions of Section 45:6-7, subdivision (h) of Title 45 of the Revised Statutes, (N. J. S. A.)." Following that finding, the State Board suspended Dr. Taber's license for a period of six months. Dr. Taber took the record to the former Supreme Court by writ of certiorari. That court decided, 135 N. J. L. 255, 51 A. 2d 250, that subdivision h of R. S. 45:6-7, N. J. S. A., upon which the action was predicated, was unconstitutional and set the suspension aside. On appeal, the Court of Errors and Appeals, 137 N. J. L. 16, 59 A. 2d 231, held that so much of the disputed section as provided that a license to practice dentistry might be revoked or suspended if the licensee "Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in section 45:6-19" (the words italicized by us above), was constitutional and remanded the record of the Supreme Court for a determination of the facts and the application thereto of the adjudicated law. Thereupon, the Supreme Court, as then constituted, reviewed the proofs and found, 137 N. J. L. 392, 60 A. 2d 290, 291, that the dental office, nominally operated by Dr. Taber, was really "handled and directed by Locks or his affiliated companies" and that the prosecutor of the writ "had been employed by an unlicensed manager, proprietor, operator or conductor as defined in the statute." The judgment giving effect to that finding is before us on the appeal of Dr. Taber.

Two points are presented in appellant's brief: first, that there was no evidence of employment; second, that the

board's suspension of the appellant's license was unconstitutional.

Mr. Locks is not a dentist. By his own statement he knows nothing about dentistry. His business, so he says, is the discounting of contracts. From the proofs in the case his activities go beyond that. He does business under trade names and through different corporations. He trades under the names of Dental Acceptance Company and of Genessee Dental Supply. He is president of Arday, Inc., and of Arnold Park, Inc. Those trade names and those corporations appear with interlocking effect in the testimony. So far as concerns this case they all mean Locks.

The office in question was originally managed by Dr. James A. Morton, a dentist. The matter began in this way: Morton saw an advertisement in the New York Times calling for a dentist registered in the State of New Jersey, offering excellent remuneration and giving a box number to which replies to the advertisement should be sent. Morton answered. He received a telegram signed with a name which he did not know and in response he went to the Waldorf Astoria Hotel, New York City, where he met the writer of the telegram, apparently a figurehead, and was introduced to Mr. David Locks. Locks asked Morton if the latter would like to operate the best equipped dental office in the State of New Jersey. Morton's testimony:

"We talked over the plan of operation which amounted to the fact that he would, his company, the Dental Acceptance Company, of Rochester, which he told me at the time he was President of, would advance sufficient funds to set up this dental office in all phases such as rent, the equipment, the supplies that were necessary, sufficient funds to carry on and from time to time additional funds if they were required until the office was on a paying basis. * * * The Dental Acceptance Company was to advance sufficient money to carry on the operation of this office. In return the Dental Acceptance Company required that all credit accounts or budget accounts that were handled in that office be signed over to the Dental Acceptance Company at a discount rate of 35 per cent. * * * We finally agreed verbally to this

plan—Mr. Locks' plan—and approximately the 12th of April, 1943, an agreement was signed in the office by me and Dave Locks in the office of Eugene Hoffman, an attorney, in Newark, New Jersey. This agreement stipulated that the Dental Acceptance Company would advance sufficient money for maintenance of this office at a discount rate, rather a down rate was to be charged on all budget accounts that were turned over to the Dental Acceptance Company. This rate was 35 per cent. There was to be retained by this company approximately 43 per cent to remain in their possession until such time as this agreement was ended—terminated. * * * The other 20 per cent was to—the other twenty some per cent was to be assigned to me in a personal account for maintenance of this office at 786 Broad Street."

The office began to operate. Dr. Taber was employed therein. Later Taber took over Morton's interest, and Morton remained as an employee in the usual manner. There was some modification in operation, but the same pattern continued. The arrangements for the transfer of interest from Morton to Taber were effected by Locks, not by negotiations between Taber and Morton. The dentist in whose name the business was conducted was little more than an office manager with a drawing account somewhat in excess of the salary of an employed dentist. The office was an advertising office. Advertising was published in the newspapers and also over the radio. The advertising copy was arranged by Locks. Most of the dental work was done on credit-contracts and the contracts were discounted by one or another of Locks' companies at heavy rates. Supplies were procured so far as possible, and sometimes to the disadvantage and inconvenience of the office, from Locks' Genessee Supply Company. "Hiring and firing" and the fixing of salaries were, in effect, and sometimes actually, done by Locks. Locks saw that money for the pay roll was at hand on pay day to the extent that the case receipts were inadequate. When Dr. Morton began his arrangements with Locks, the lease for the office was negotiated by Locks with the owner, was signed by Morton, guaranteed as to rent

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by Dental Acceptance Company and David Locks and assigned to Dental Acceptance Company. Taber, when he came in, operated some months under the same lease; then a new lease was made but it was not made to Taber. It was made by the owner to "The Dental Acceptance Company by David Locks" as tenant and "assigned" by the latter to Taber under a written consent by the landlord that the tenant might "sublet" to him. Taber paid the rental but the owner, on its books, credited the payment to the tenant named in the lease. Taber made a daily report to Arday or Arnold Park Corporation of payments on credit accounts; he admits that he acted only as agent as to them. He also sent in copies of the daily record sheets showing payments which were not on credit accounts. Dr. Taber was asked by the president of the dental board:

"I'd like to ask why a copy of the cash account is sent to Rochester when they have no interest in the cash accounts, but only interest in the budget accounts? It's none of his business. Why should he receive that information?"

The answer given by the witness was:

"I don't mind letting him know. He has quite an interest in seeing that the organization is running nicely. * * * The better I run that organization, the better it is for him."

The control over employments, discharges, salaries, procurement of supplies and office finance was such that in each of these several respects Taber was compelled by force of the facts to admit from time to time to those who were to be affected by the announced act or omission that he was "sorry", he "would like to", he "Would like not to", depending upon the problem of the moment, but that "it was Mr. Locks' order" that he should do as he was doing.

(1) The record presents adequate evidence to support the factual findings of the Supreme Court. It does not show that Locks proposed or that Taber accepted employment by the use of that precise word. It does provide a substantial basis for concluding that Dr. Taber's control over the office and its management was subordinate, that

the real operator and conductor was David Locks, who was not a licensed dentist, and that the relationship between the two constituted employment in the statutory sense.

We pass to appellant's second point

(2) It is apparent that the former Supreme Court addressed itself to the narrowed question of whether or not the proofs brought Dr. Taber within the application of so much of the statute, R. S. 45:6-7, subd. h as amended by chap. 316, P.L. 1941, and chap. 193, P.L. 1945, N.J.S.A. 45:6-7, subd. h, as the Court of Errors and Appeals had found, 137 N.J.L. 161, 59 A. 2d 231, supra, to be constitutional, namely, that "any license to practice dentistry may be revoked or suspended by the board upon proof to its satisfaction that the licensee: * * * Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in section 45:6-19 of this Title * * *". The Supreme Court opinion concludes: "We have no difficulty in finding that the prosecutor of this writ had been employed by an unlicensed manager, proprietor, operator or conductor as defined in the statute. Judgment, in accordance with the mandate of the Court of Errors and Appeals, shall be entered." The judgment as entered determined that "The facts justified a finding that the prosecutor had been employed by an unlicensed manager, proprietor, operator or conductor as defined in the statute, and that the action of the defendant in suspending the license of the prosecutor was proper under the statute." The judgment further directed that the proceedings and resolution of the State Board of Registration and Examination in Dentistry should "be in all things affirmed"; but this generalization was not necessary to the decision, was not in logical sequence to the opinion and was not, we think, intended by the court. The draftsman of the judgment seems to have enlarged the same beyond the intended scope of the adjudication. The judgment should be amended to conform to the provisions of the opinion and the preceding language in the judgment itself.

(3, 4) The dentistry statute provides, R. S. 45:6-9, N.J.S.A., that on the review of the action of the dental

board in revoking or suspending a license the court shall determine questions of fact as well as of law and may reverse or affirm in whole or in part the finding or determination of the board or pronounce such judgment on the evidence as shall be warranted. Cf. Schwartz *v.* State Board of Registration and Examination in Dentistry, sup. 1940, 125 N.J.L. 330, 15 A. 2d 322. It was fully within the authority of the former Supreme Court to review the evidence, to make new findings thereon and to pronounce judgment. What it did, in our view, was within that field. It found that a violation of the cited portion of the statute had been charged against Taber, that the proofs showed the accused to be guilty thereof and that the suspension of the license of a period of six months should stand as a proper penalty; and we are in accord with that finding.

We have no occasion to review the determination of the Court of Errors and Appeals, supra, that the involved portion of the statute is both severable and constitutional.

The judgment below should be modified in the respect mentioned above and, as so modified, affirmed.

For affirmance: Chief Justice Vanderbilt, Justices Case, Oliphant, Burling, and Ackerson—5.

Opposed: None.

Filed: Jan. 24, 1949. Charles K. Barton, Clerk.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 786

SYDNEY A. TABER,

Appellant,

v.

STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY OF NEW JERSEY,

Appellee.

STATEMENT OF APPELLANT OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

1. Appellee's motion to dismiss the appeal in this cause appears to be based in part on the proposition that since the (new) Supreme Court of New Jersey stated that it had "no occasion to review the determination of the Court of Errors and Appeals, supra, that the involved portion of the statute is . . . constitutional," appellant cannot maintain an appeal, since the latest decision of the New Jersey courts did not rule upon the constitutional question.

The Supreme Court of New Jersey is the successor to the New Jersey Court of Errors and Appeals as the highest court of New Jersey, and thus was merely stating that since it had remanded the case for fact-finding only, it would not, on the second appeal, review its own (in effect) prior decision on constitutionality. It is well settled that in such cases, there is a "final" judgment on constitutionality, even though the court on the second appeal declined to consider legal issues. *Great Western Telegraph Co.* v. *Burnham,* 162 U. S. 339; *McComb* v. *Commissioners of*

Knox County, 91 U. S. 1; *Gant* v. *Oklahoma City,* 289 U. S. 98.

2. Appellee also bases its motion to dismiss on the proposition that appellant did not challenge the portion of the statute held constitutional by the Court of Errors and Appeals. Appellee is in error on this point, but in any case this issue is irrelevant since the Court of Errors and Appeals *did* decide the constitutional question and specifically held this portion to be constitutional. It is "an elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a [state] court . . . when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. of N. Y.* v. *Cohen,* 234 U. S. 123; many cases could be collected to the same effect.

3. Appellee states that the question is not substantial. The question is as substantial, and as extensive, as the regulation of the professions in the forty-eight states. In the twenty years since *Liggett* v. *Baldridge,* 287 U. S. 105, there has been a virtual revolution in the state regulation of professions, with so-called "medical codes," "dental codes," etc., being enacted in many states. No guidance has come from this Court concerning the permissible limits of that kind of legislation since 1928. Little help is furnished in the abstract by such criteria as "unreasonable and extravagant," "wholly arbitrary," or "without due process of law," all of which are offered as guides by appellee, and only a definitive ruling by this Court will be of assistance.

Respectfully submitted,

IRVING R. M. PANZER,
Attorney for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 786

SYDNEY A. TABER,

Appellant,

vs.

STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY OF NEW JERSEY

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

THEODORE D. PARSONS,
Attorney General of New Jersey;
JOSEPH A. MURPHY,
Assistant Deputy Attorney General of New Jersey;
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 786

SYDNEY A. TABER,

Appellant,

vs.

STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY OF NEW JERSEY,

Appellee

STATEMENT OF APPELLEE MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL THE JUDGMENT IN QUESTION, INCLUDING APPELLEE'S MOTION TO DISMISS OR AFFIRM THE APPEAL

The appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this, its statement in opposition to appellant's statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal on the ground of lack of jurisdiction, or in the alternative to affirm the judgment of the Supreme Court of New Jersey on the ground that the questions raised by the appellant are so unsubstantial as not to need further argument.

This cause appears to be reviewable by the Supreme Court on direct appeal from the Supreme Court of New Jersey. Appellee asserts, however, that jurisdiction is lacking under the statute and in addition the unsubstantial character of the grounds stated by appellant are so apparent on the face of the record as to warrant the Court in summarily disposing of the appeal at this stage of the proceeding.

The matters relied upon by appellee are more particularly stated below:

1. Matters and Grounds Making Against Jurisdiction

The appellee, State Board of Registration and Examination in Dentistry of New Jersey, served on appellant, Sydney A. Taber, on May 15, 1946, a notice of hearing for revocation or suspension of his license to practice dentistry. (R. pp. 5-7). Said notice of hearing stated that the appellant had violated Section 45:6-7(h) of Title 45 of the Revised Statutes of New Jersey on the following grounds:

> That appellant had been employed by an unlicensed manager, proprietor, operator and conductor as defined in Section 45: 6-19 of Title 45 of the Revised Statutes of New Jersey;
>
> That the appellant had entered into possession of such dental material and equipment as is necessary for the management of a dental office which is owned by such unlicensed manager, proprietor, operator and conductor on the basis of a lease and other agreement for compensation for the use of such material, equipment and office; and
>
> That the appellant had entered into an arrangement by which there was made available to him, for his use, dental material, equipment, and office, the ownership and control of which was retained by such unlicensed manager, proprietor, operator and conductor, etc.

The notice of hearing is couched in the language of the statute.

The statutes involved in this cause are section 45:6-7(h) and section 45:6-19 of Title 45 of the Revised Statutes of New Jersey (NJSA 45:6-7(h) and 45:6-19).

Section 45:6-7(h) reads as follows:

> "Any license to practice dentistry may be revoked or suspended by the board upon proof to its satisfaction that the licensee: * * *"
>
> "h. Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in section 45:6-19 of this Title or has entered into possession of such dental material or equipment, as may be necessary for the management of a dental office which is owned by any such unlicensed manager, proprietor, operator or conductor on the basis of a lease or other agreement for compensation for the use of such material, equipment or office or has entered into any arrangement by which there is made available to him, for his use, dental material, equipment or office, the ownership or control of which is retained by any such unlicensed manager, proprietor, operator or conductor, except where the transaction is a bona fide sale of dental material or equipment secured by chattel mortgage or conditional sale agreement."

Section 45:6-19 reads as follows:

> "The terms manager, proprietor, operator or conductor as used in this chapter shall be deemed to include any person who
>
> (1) Employs operators or assistants; or
>
> (2) Places in the possession of any operator, assistant, or other agent such dental material or equipment as may be necessary for the management of a dental office on the basis of a lease or any other agreement for compensation for the use of such material, equipment or office; or;
>
> (3) Retains the ownership or control of dental material, equipment or office and makes the same available

in any manner for the use by operators, assistants or other agents; provided, however, that the above shall not apply to bona fide sales of dental material or equipment secured by chattel mortgage."

A hearing was held, at which evidence was introduced showing the appellant's employment by David Locks, an unlicensed person, Dental Acceptance Co., Gennessee Dental Supply Co., two trade names under which said David Locks traded; Arday Inc. and Arnold Park, Inc., two corporations of which said David Locks was president.

On July 27, 1946, the State Board of Registration and Examination in Dentistry of New Jersey adopted a resolution in which the Board found appellant guilty of violating said Section 45:6-7(h) by being so employed and ordered his dental license suspended for a period of six months (R. pp. 317-319).

A writ of certiorari was taken to the (former) New Jersey Supreme Court to review the action of the Dental Board. In the Reasons for Reversal (R. pp. 3-4) filed by appellant in certiorari, the only objection as to constitutionality was made to that portion of the quoted statute (R.S. 45:6-7(h)) which dealt with the leasing of equipment for dental purposes. No constitutional objection was raised as to the first portion of the quoted statute which inhibits the employment of licensed dentists by an unlicensed manager, proprietor, operator or conductor of a dental office.

On February 18, 1947, that court, on writ of certiorari, filed its opinion which held that subdivision (h) of Section 45:6-7 was unconstitutional upon the ground that it was a violation of the constitutional right to be free of arbitrary interference with a lawful calling. The opinion is reported in 135 N.J.L. 255; 51 Atl. (2d) 250 (R. pp. 321-322). It will be noted that this opinion addresses itself solely to the latter clauses of the statute in dispute. It did not concern itself or decide the constitutionality of the first portion of the

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statute in question (R.S. 45:6-7(h)) which prohibited employment of a licensed dentist by an unlicensed manager, proprietor, operator or conductor of a dental office.

The conviction and suspension of the appellant by the State Board of Registration and Examination in Dentistry of New Jersey was reversed and set aside pursuant to this opinion in a Rule for Reversal filed February 26, 1947.

On September 26, 1947, a notice of appeal from this decision and judgment to the Court of Errors and Appeals, the court of last resort in all causes in New Jersey, was filed (R., p. 324). The New Jersey Court of Errors and Appeals in an opinion filed on May 13, 1948, and reported in 137 N.J.L. 161, 59 Atl. (2d) 231, reversed the New Jersey Supreme Court and held constitutional so much of said Section 45:6-7(h) of the Revised Statutes as reads as follows:

> "h. Has been employed by an unlicensed manager, proprietor, operator or conductor as defined in Section 45:6-19 of this Title * * *".

It is important to note that the constitutionality of the other two clauses was not decided and therefore are still declared to be unconstitutional under the original decision of the (former) New Jersey Supreme Court in certiorari.

The Court of Errors and Appeals in said opinion remanded the case to the (former) Supreme Court to determine questions of fact and that court in accordance with the remand filed an opinion July 15, 1948, holding that the record justified the finding that the appellant had been employed by an unlicensed manager, proprietor, operator or conductor as defined in the statute and therefore came within the portion of the statute held constitutional in the decision of the Court of Errors and Appeals.

An appeal was then taken by appellant from this decision to the Court of Errors and Appeals. While this appeal was

pending, the Court System of New Jersey was reorganized, and the (new) Supreme Court of New Jersey [1] took over all cases pending before the Court of Errors and Appeals.

On January 24, 1949, the (new) Supreme Court of New Jersey handed down its decision and judgment. It affirmed the second decision and findings of fact of the (former) Supreme Court (63 Atl. (2d) 535; —— N.J.L. —— not officially reported). Subsequently, a petition for re-hearing was filed and denied by the (new) Supreme Court on February 14, 1949, without opinion.

Appellant now appeals from the latest decision and judgment of the (new) Supreme Court of New Jersey. He bases his appeal on 28 U.S.C. 1257(2) on the ground that the validity of a State statute was drawn into question as repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States and the decision was in favor of the validity of the State statute. The latest decision did not decide the constitutional question. An examination of the decision discloses that only a question of fact was determined and the constitutional question was not considered. In fact the court refused to pass upon the constitutional question and stated on the last page of its opinion (63 Atl. (2d) 535, at page 538).

> "We have no occasion to review the determination of the Court of Errors and Appeals, supra, that the in-

[1] Under the new Constitution in the State of New Jersey, the court system of New Jersey was changed while this case was pending on the second appeal to the Court of Errors and Appeals. That part of the Constitution which established the new court system became effective September 15, 1948. The name of the New Jersey Court of Errors and Appeals was changed to the Supreme Court of New Jersey. The name of the New Jersey Supreme Court was changed to the Superior Court. The Supreme Courts will be distinguished by the term "former" Supreme Court which existed prior to the adoption of the Constitution and is the one to which the writ of certiorari was taken; that term (new) Supreme Court will be used to designate the Supreme Court which was established by the new Constitution and is now the court of last resort, instead of the Court of Errors and Appeals.

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volved portion of the statute is both severable and constitutional."

Two questions therefore arise in this matter. First, is there a Federal question raised in view of the fact that the latest decision is only one of fact and the only decision based upon the constitutional objection of appellant is that handed down by the (former) Supreme Court (135 N.J.L. 255, 51 Atl. (2d) 250) which was in his favor; and second, is there a substantial Federal question involved.

A. Is There a Federal Question?

The only objection as to constitutionality was raised in the Reasons for Reversal filed (R. pp. 3-4) in the (former) New Jersey Supreme Court on review by writ of certiorari of the board's order of suspension. It is directed to that portion of Section 45:6-7(h) of the Revised Statutes of New Jersey with respect to the leasing of equipment for dental purposes. This part of the statute was held unconstitutional in the first decision of the (former) New Jersey Supreme Court, reported in 135 N.J.L. 255, 51 Atl. (2d) 250. This portion of the decision has not been expressly overruled by the highest court of this State. It still stands and as a result the contention of appellant is affirmed and sustained. The Court of Errors and Appeals in its decision, reversing this first decision of the (former) New Jersey Supreme Court, reported in 137 N.J.L. 161, 59 Atl. (2d) 231, was not concerned with that portion of the statute decided in that court but directed its opinion only to that portion which prohibited a licensed dentist from being employed by an unlicensed manager, proprietor, operator or conductor as defined in Section 45:6-19 of the Revised Statutes of New Jersey. The appellant did not challenge this portion of the statute in the lower tribunal. He now has no right to raise that question on this appeal. This court on appeal will not review a question

which was not raised in the lower State tribunal. *Chicago B. & Q. R. Co.* v. *Railroad Commission*, 35 S. Ct. 450; 237 U. S. 220; *Bullen* v. *Wisconsin*, 36 S. Ct. 473, 240 U. S. 625.

Since the only objection as to constitutionality raised by appellant in the lower tribunal was to that portion of the statute declared to be unconstitutional by the (former) New Jersey Supreme Court, and this objection was sustained, appellant therefore has no right under 28 U. S. C. 1257, subdivision 2, to appeal to this Court. The only remedy by appeal under 28 U. S. C. 1257(2) is where the decision is against the appellant and in favor of the validity of the statute. Such was not the result in this case. The appellant recognized this defect at the time he took this appeal and attempted to remedy it by filing a petition for re-hearing in the (new) Supreme Court of New Jersey, raising constitutional questions. This petition, however, was denied on February 14, 1949, without opinion.

The appellee therefore urges upon this Court the fact that no jurisdiction exists under 28 U. S. C. 1257 (2) as contended by appellant. The only objection raised by appellant as to constitutionality was decided in his favor. The court then decided the statute was severable and the severed portion constitutional. Severability is a State question. *Guinn* v. *U. S.*, 35 S. Ct. 926, 238 U. S. 347, 366; *Myers* v. *Anderson*, 35 S. Ct. 932, 238 U. S. 368, 380; *Mayflower Farms* v. *Ten Eyck*, 56 S. Ct. 457, 297 U. S. 266. Appellant did not object to the portion declared by the Court of Errors and Appeals as constitutional. The only portion to which he objected as unconstitutional being decided in his favor, he cannot appeal from such a judgment.

B. Is There a Substantial Federal Question Raised?

The appellant now raises the unconstitutionality of that portion of R. S. 45:6-7(h) which reads as follows:

> "Any license to practice dentistry may be revoked or suspended by the board upon proof to its satisfac-

tion that the licensee: * * * (h) has been employed by an unlicensed manager, proprietor, operator or conductor as defined in Section 45:6-19 of this title * * *."

In spite of the fact that the constitutionality of this portion of the statutory provision was not disputed in the State courts, and should not now be raised, the appellee still contends that there is no substantial basis for objection to even this quoted portion of the statute. The (new) Supreme Court of New Jersey held that the record was sufficient to show that the appellant came within the above quoted portion of the statute and sustained the suspension of his license by the State Board of Registration and Examination in Dentistry of New Jersey. This question of fact was decided in the second opinion of the (former) Supreme Court on certiorari and sustained by the (new) Supreme Court of New Jersey. The latest decision of the (new) Supreme Court of New Jersey, not officially reported, is printed in 63 Atl. (2d) 535. Findings of fact, it has been held, are binding on writs of error to a State court. *Noble* v. *Mitchell*, 17 S. Ct. 110, 164 U. S. 367; *Christman* v. *Miller*, 25 S. Ct. 468, 197 U. S. 313; *Standard Oil* v. *Brown*, 30 S. Ct. 669, 218 U. S. 78.

Since the highest court of the State of New Jersey has found that the facts are within the statute, the single question for determination is whether said portion of the statute is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution. The appellee contends that a mere examination of the statute itself discloses that it is not repugnant and that consequently a substantial Federal question has not been raised by appellant.

The United States Supreme Court on a number of occasions has held that a State, in providing for the general welfare of its people, may prescribe all such regulations as in its judgment will secure or tend to secure them against

the consequences of ignorance and incapacity, as well as of deception and fraud, and as a means to this end may impose qualifications for those who wish to practice a profession. *Dent* v. *West Virginia*, 9 S. Ct. 231, 129 U. S. 114; *Crane* v. *Johnson*, 37 S. Ct. 176, 242 U. S. 339; *Hawker* v. *New York*, 18 S. Ct. 573, 170 U. S. 189; *Reetz* v. *Michigan*, 23 S. Ct. 190, 188 U. S. 505; *Semler* v. *Oregon*, 55 S. Ct. 570, 294 U. S. 608; *Graves* v. *Minn.* 47 S. Ct. 122, 272 U. S. 425; *Watson* v. *Md.* 30 S. Ct. 644, 218 U. S. 173; *Collins* v. *Texas*, 32 S. Ct. 286, 233 U. S. 288.

Since it is within the power of a State in the exercise of its police power to provide qualifications of skill, learning and character for those who wish to be licensed to practice a profession, it is also a concomitant of such power that the State may impose conditions which require the continuance of such skill, learning and character. That portion of the statute in question which relates to the employment of licensed dentists by an unlicensed manager, proprietor, operator or conductor of a dental office is directed to the character of the licensed dentist. It is designed to prevent the practice of dentistry by unlicensed persons through the medium of unscrupulous and unethical licensees. An unlicensed person cannot practice a profession directly and certainly he should not be permitted to practice indirectly. Any person who attempts by subterfuge and evasion to weaken a statute which is for the public health and welfare of the citizens, or to evade its terms, has not the requisite moral character necessary for a person practicing a profession so closely allied to the health and welfare of the citizens as dentistry.

Regulations respecting the pursuit of a profession are of very frequent occurrence and what such regulations shall be and as to what particular professions they shall apply are questions for the State to determine. Unless the

regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the State to pass. *Williams* v. *Arkansas,* 30 S. Ct. 493, 217 U. S. 79.

In the case of *State Board of Dental Examiners* v. *Miller,* 90 Col. 193, 8 Pac. (2d) 699, a dental board revoked the license of dentists for unprofessional and dishonorable conduct and gross violation of their professional duties upon the ground they had accepted employment and practiced dentistry under a corporation which was not licensed; had knowingly aided and abetted a corporation in practicing dentistry and had conducted the office under their own names for the purpose of concealing the fact that the corporation had an interest in and partial or entire control and management of the dental office. The highest court of the State affirmed the action of the Dental Board and held that the statute was not void for uncertainty, that the practice of dentistry through the medium of a corporation was sufficient to revoke the license and that the bartering of a license by a dentist to a corporation was against public policy.

An appeal was taken to the United States Supreme Court and in a per curiam opinion, the Colorado court was sustained for lack of a Federal question in *Miller* v. *State Board of Dental Examiners,* 53 S. Ct. 6, 287 U. S. 563.

Similar statutes have also been held constitutional in the following cases: *Dr. Bloom, Dentist* v. *Cruise,* 53 S. Ct. 320, 288 U. S. 588, 259 N.Y. 358, 182 N.E. 16. Appeal to the United States Supreme Court dismissed for want of substantial Federal question. *People* v. *Painless Parker,* 275 Pac. 928, 5 Col. 304. Petition for certiorari denied, 50

S. Ct. 25, 280 U. S. 566. *Winslow* v. *Kansas State Board of Dental Examiners et al*, 223 Pac. 308, 115 Kansas 450. *People* v. *Carroll*, 274 Mich. 451, 264 N.W. 861.

The Appellant relies upon the case of *Liggett* v. *Baldridge*, 49 S. Ct. 57, 287 U. S. 105. The court in that case construed a Pennsylvania statute which prohibited ownership of drug stores or interest in corporations, partnerships or associations owning such stores by other than licensed pharmacists. It held that such a statute was invalid as denying due process of law under the Fourteenth Amendment. This case is not pertinent. The court in the *Baldridge* case held the plaintiff corporation was conducting an ordinary business and that the mere operation and ownership of a drug store can have no real or substantial relation to public health. Such is not the case here. The appellant is engaged in and assumed to be practicing the profession of dentistry. It is closely allied to and directly affects the health of the public. The services rendered are personal and call for knowledge of a high degree. To separate this knowledge from the power of control is an evil the occurrence of which was attempted to be prevented by the legislation in question. The applicable principles of law where restrictions are placed upon private business and where regulations are as to matters affecting the public health, like the practice of dentistry, are greatly different. The principle in the *Liggett* case is not applicable here. Furthermore, in the case of *John M. Daniel* v. *Family Security Life Insurance Co.* decided February 28, 1949 and contained in 14 L.W. 4226, this court commented upon the *Liggett* v. *Baldridge* case, *supra*, and held that the Liggett case was concerned with ownership of drug stores which might have no connection with the pharmaceutical branch and restricted in its opinion the application of the Liggett

case to a private business, rather than to a profession. As a result the Liggett case appears to be limited in its application and is not applicable to a licensed professional dentist.

The appellant also places reliance upon the case of *State* v. *Brown*, 37 Wash. 97, 79 Pac. 635, which holds that the State could not require the owner of a dental parlor to be a licensed dentist. It is significant to note that the case was decided in 1905 and in 1919 the same court held in *State* v. *Merchants Protective Corp.*, 105 Wash. 12, 177 Pac. 694, that a corporation could not legally practice law. The *Brown* case appears to be an exception to the general rule. In fact the case of *People* v. *Carroll* 274 Mich. 451, 264 N. W. 861, *supra*, which involved a statute requiring the owner of a dental office to be licensed, criticizes this case and held that the principle for which it stood was not applicable. The criticism pointed out in the *People* v. *Carroll* case is pertinent here.

The act regulating the practice of dentistry and acts of similar nature are not passed to promote the personal ends of individuals but as salutary enactments in the exercise of the police power of the State to legislate for the safety, health and welfare of the people. This end cannot be attained if the act in question is weakened or defeated by subterfuge or circumvented by devious methods.

For these reasons this court should decline to take jurisdiction in this cause.

2. Motion To Dismiss or Affirm

Appellee respectfully submits this statement showing there is no Federal question involved and consequently a lack of jurisdiction; further the question of the constitutionality of that part of R.S. 45:6-7(h) involved in this cause is so unsubstantial as not to need further argument.

WHEREFORE, appellee respectfully moves the court to dismiss the appeal in this cause or in the alternative to affirm the judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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(2429)

JUNE 6, 1949.

Per Curiam Decisions.

No. 786. TABER *v.* STATE BOARD OF REGISTRATION AND EXAMINATION IN DENTISTRY. Appeal from the Supreme Court of New Jersey. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Irving R. M. Panzer* and *Henry G. Fischer* for appellant. *Theodore D. Parsons*, Attorney General of New Jersey, and *Joseph A. Murphy*, Assistant Deputy Attorney General, for appellee. Reported below: 1 N. J. 351, 63 A. 2d 535.